No. 94592-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 33556-9-III
Court of Appeals of the State of Washington
Division III

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON, ORALIA GARCIA AND MARRIETTA JONES, individually, and on behalf of similarly-situated registered nurses employed by Our Lady of Lourdes Hospital at Pasco d/b/a Lourdes Medical Center,

Petitioners,

v.

OUR LADY OF LOURDES HOSPITAL AT PASCO d/b/a Lourdes Medical Center, AND JOHN SERLE, individually and in his office capacity as an agent and officer of Lourdes Medical Center,

Respondents.

BRIEF OF *AMICI CURIAE* WASHINGTON STATE LABOR COUNCIL, WASHINGTON STATE NURSES ASSOCIATION, SEIU HEALTHCARE 1199NW, UNITED FOOD AND COMMERCIAL WORKERS LOCAL 21

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The interests of *Amici Curiae* Washington State Labor Council ("WSLC"), Washington State Nurses Association ("WSNA"), United Food and Commercial Workers Local 21 ("UFCW Local 21"), and SEIU Healthcare 1199NW ("SEIU 1199NW") are fully set forth in the Motion for Leave to File Brief of *Amici Curiae* filed herewith.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case stands to deny nurses working in hospital settings a meaningful way to remedy systematic violations of their right to work-free time to rest, relax and eat amidst the demanding, life-sustaining patient care that they provide, often for 12 or more hours in a shift. *Amici Curiae* respectfully request that this Court reverse the Court of Appeals' decision affirming the trial court's denial of class certification. The trial court abused its discretion by determining that differences between various departments and nurses' shifts precluded a finding that common questions of law and fact as to whether Our Lady of Lourdes Hospital ("Hospital") denied nurses statutorily-compliant rest and meal periods "predominate[d] over any questions affecting only individual members." *Chavez v. Our Lady of Lourdes Hospital at Pasco*, 197 Wn. App. 1067, *15-16 (2017).

STATEMENT OF THE CASE

Amici Curiae adopt Petitioners' statement of the case.

ARGUMENT

I. Class Actions Enable Nurses to Effectively Vindicate Their Right to Statutorily-Compliant Rest and Meal Breaks.

This Court has acknowledged that "rest periods help ensure nurses can maintain the necessary awareness and focus required to provide safe and quality patient care." *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 832, 287 P.3d 516 (2012). Beyond a nurse's ability to provide safe patient care, however, receiving inadequate rest and meal breaks has immediate impacts on a nurse's safety and wellbeing. Due to the physical demands of the job, nurses are at increased risk of sustaining musculoskeletal injuries, and a nurse's work schedule, including working long hours or working without breaks, is associated with an increased risk of neck, shoulder, and back musculoskeletal disorders.[1] In fact, the Bureau of Labor Statistics lists nursing as the sixth most at-risk occupation for strains and sprains.[2] The U.S. Center for Disease Control reports a link between length of working hours and nurses' increased risk for back disorders, odds for higher alcohol use, increased smoking and higher risk

[1] Lipscomb, Trinkoff, Geiger-Brown, & Brady, *Musculoskeletal problems of the neck, shoulder, and back and functional consequences in nurses*, AMERICAN JOURNAL OF INDUSTRIAL MEDICINE, 41(3):170-8 (2002). *See also* Trinkoff, Le, Geiger-Brown, Lipscomb, & Lang, *How Long and How Much Are Nurses Working?* AMERICAN JOURNAL OF NURSING, 106(4), 60-71 (2006).

[2] Bureau of Labor Statistics News Release (November 19, 2015), *Nonfatal Occupational Injuries and Illnesses Requiring Days Away from Work, 2014*, Table 16.

for auto accidents.[3] Working long hours has also been associated with an increased risk of nurses receiving needlesticks.[4]

Fatigue is another problem that plagues nursing, causing the majority of nurses to be concerned about their ability to provide patient care safely.[5] Nurse fatigue has been found to contribute to driving drowsiness, affects sleep patterns, and is linked to depression, anxiety, and health complaints.[6] A significant connection has been found between nurses' wellness, fatigue, and the opportunity to recover from fatigue.[7] Researchers have found a pressing need for steps to be taken to promote restorative breaks for nurses.[8]

It was concern over precisely these sorts of dangers that led the Legislature to enact the Industrial Welfare Act, RCW 49.12 ("IWA") in

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[3] Caruso, Hitchcock, Dick, Russo, Schmit, *Overtime and Extended Work Shifts: Recent Findings on Illnesses, Injuries and Health Behaviors*, CDC WORKPLACE SAFETY AND HEALTH, April 2004.

[4] Clarke, *Hospital Work Environments, Nurse Characteristics and Sharps Injuries*, AMERICAN JOURNAL OF INFECTION CONTROL, 35(5), 302-309 (2007); Trinkoff, Geiger-Brown, & Lipscomb, *Work Schedule, Needle Use, and Needlestick Injuries Among Registered Nurses*, INFECTION CONTROL AND HOSPITAL EPIDEMIOLOGY, 28(2), 156-164 (2007).

[5] Bird, J (2013). Survey: Nurse understaffing, fatigue threatens patient safety. FierceHealthcare.

[6] Bahr, Buth, Martin, Peters, Swanson, Warhanek, Ryan, *White Paper: Nurse Scheduling and Fatigue in the Acute Care 24 Hour Setting*, Evidence Table I, at p. 19, citing Ruggiero, J.S., *Correlates of fatigue in critical care nurses*, RESEARCH IN NURSING & HEALTH, *26*, 434-442 (2003).

[7] Steege, *Relationships between Wellness, Fatigue and Internship Recovery in Hospital Nurses*, Proceedings of the Human Factors and Ergonomics Society Annual Meeting, September 2014, Vol. 58, No. 1 778-782.

[8] Negati, Shepley, & Rodiek, *A Review of Design and Policy Interventions to Promote Nurses' Restorative Breaks in Health Care Workplaces*, SAGE JOURNALS (2016).

1913, declaring that "[t]he welfare of the state of Washington demands that [all employees] be protected from conditions of labor which have a pernicious effect on their health." RCW 49.12.010. In 1976 the Washington State Department of Labor and Industries ("L&I") determined that working for long stretches of time without meal periods and rest periods created "conditions of labor" with pernicious effect on employees' health. L&I promulgated WAC 296-126-092 entitling workers to mandatory rest breaks and meal periods.

Twice in the last two years this Court has resoundingly held that "WAC 296-126-092 imposes a mandatory obligation on the employer to provide meal breaks and to ensure those breaks comply with the requirements of WAC 296-126-092." *Brady v. AutoZone, Inc*., 188 Wn.2d 576, 584, 397 P.3d 120 (2017); *Lopez Demetrio v. Sakuma Bros. Farms, Inc.,* 183 Wn.2d 649, 658, 355 P.3d 258 (2015). In *Lopez Demetrio,* this Court confirmed,

> It is not enough for an employer to simply schedule time throughout the day during which an employee can take a break if he or she chooses. Instead, employers must affirmatively promote meaningful break time. **A workplace culture that encourages employees to skip breaks violates WAC 296-126-092**….

183 Wn.2d at 658 (emphasis added). *Accord Hill v. Garda CL Northwest, Inc*., 198 Wn. App. 326, 356, 394 P.3d 390 (2017), *rev. granted* 189 Wn.2d 1016 (2017).

It is imperative that nurses like those in this case be afforded the opportunity to receive meal and rest breaks, in order to ensure the safety both of themselves and their patients. Class actions allow nurses working in hospitals to effectively vindicate those rights by providing an effective means for adjudicating numerous, similar claims. "[A] primary function of the class suit is to provide a procedure for vindicating claims which, taken individually, are too small to justify individual legal action but which are of significant size and importance if taken as a group." *Brown v. Brown*, 6 Wn. App. 249, 253, 492 P.2d 581 (1971). Washington courts interpret CR 23 liberally to effectuate its objective. "Not only does liberal application of the rule avoid multiplicity of litigation, but (1) it saves members of the class the cost and trouble of filing individual suits; and (2) it also frees the defendant from the harassment of identical future litigation." *Id*. at 256-57.

Wage and hour cases are particularly well suited to class treatment, as they often involve employer-wide pay practices affecting a relatively large number of employees with relatively small monetary claims. Thus, Washington courts have regularly certified wage and hour actions, including rest breaks and meal breaks cases, under CR 23. *See, e.g., Hill*, 198 Wn. App. at 339 (affirming class certification of nearly 500 armored vehicle company employees who sought compensation for missed rest and meal breaks and affirming award of interest and backpay); *Pellino v. Brink's Inc*., 164 Wn. App. 668, 684, 267 P.3d 383 (2011).

II. The Existence of Individual Variations in Damages Does Not Defeat Predominance.

Courts have consistently held that where evidence of wrongdoing on a class-wide basis exists, "the need for individualized findings as to the amount of damages does not defeat class certification." *Vaquero v. Ashley Furniture Indus.*, 824 F.3d 1150, 1155 (9th Cir. 2016). *See also Smith v. Behr Processing Corp.*, 113 Wn. App. 306, 323, 54 P.3d 665 (2002) ("[t]hat class members may eventually have to make an individual showing of damages does not preclude class certification"); *Miller v. Farmer Bros. Co*, 115 Wn. App. 815, 825, 64 P.3d 49 (2003) ("the fact that . . . individual issues might take some time to resolve does not defeat predominance . . . ."). Variation in the amount of back pay per employee inheres in wage and hour class actions and does not bar certification. *Id*.

Moreover, commonality is not defeated even where there are some class members to whom the unlawful practices do not apply at all. *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 280, 267 P.3d 998 (2011) (affirming certification of a CR 23(b)(3) class despite evidence that certain members of the class had not been harmed and would be entitled to no damages). In *Anfinson v. FedEx Ground Package System, Inc.*, this Court held that plaintiffs did not have to prove that an alleged wage violation affected every single class member to establish liability. 174 Wn.2d 851,

875-76, 281 P.3d 289 (2012). The Court affirmed the use of representative testimony to prove class-wide liability and held that class-wide liability can be found even if some workers were not subject to the unlawful policy and practice. *Id.* at 874-77. *See also Anfinson v. FedEx Ground Package System, Inc*., 159 Wn. App. 35, 68, 244 P.3d 32 (2010) ("once at trial, plaintiffs may rely on testimony and evidence of representative employees to prove that the defendant's practices or policies impacted similarly situated employees"). Accordingly, the fact that there may be some differences among how many minutes individual employees got to eat or rest on any given day does not defeat commonality in a meal and rest break case.

The use of representative evidence to prove a pattern or practice of violations is well established in cases involving meal and rest periods, even where there is some variation among employees about the extent of the violations. *See, e.g., Pellino,* 164 Wn. App. at 676; *Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 363, 368, fns. 8, 9, 312 P.3d 665 (2013). *See also Reich v. Southern New England Telcoms. Corp.*, 892 F. Supp. 389, 396-97, 403-04 (D. Conn. 1995), *aff'd*, 121 F.3d 58 (2d Cir. 1997) (affirming determination of liability for a class of several thousand workers based on representative testimony from 39 employees, despite variations in the frequency of missed lunch periods among the class

ranging from 50 to 98 percent); *Meyers v. Crouse Health Sys., Inc.*, 274 F.R.D. 404, 423 (N.D.N.Y. 2011) (affirming certification of a class of hospital workers including registered nurses covering 241 different job titles over 145 departments at multiple facilities, notwithstanding hospital's claim of "varying number and frequency of missed meal breaks, how often the automatic [meal break] deduction was cancelled, and whether supervisors discouraged employees from requesting payment for missed meal breaks").

The rationale for allowing representative testimony where the employer has failed to keep adequate records of time worked is that to hold otherwise would reward employers for failing to maintain records and ensure workers are paid for all hours worked. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946) (in a wage case where an employer has failed to keep accurate records, "[t]he solution [] is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation…"). Thus, when an employer's payroll records are insufficient to determine the time worked, "the court

may then award damages to the employee[s]" on the basis of representative evidence establishing the extent of the work as a matter of just and reasonable inference "even though the result be only approximate." *Id.* at 687-88; *Pugh*, 177 Wn. App. at 368.

In *Pugh*, a case involving precisely the same factual context as here—nurses claiming back pay for missed breaks—the Court of Appeals held that even where "all parties agree that nurses in different sections of the hospital missed breaks at various rates," damages could be calculated as a matter of just and reasonable inference based on representative testimony from each department as proof of the damages, along with data about the number of hours the nurses worked per week, their hourly rate and the number of breaks to which they were entitled. *Pugh,* 177 Wn. App. at 367-68 and n. 8, 9 (citing *Anderson*, 328 U.S. at 687).

Pursuant to the foregoing, even assuming the evidence at trial establishes that individual nurses here missed breaks in different units at different rates, that is simply an issue of damages; thus, those differences are not a proper basis on which to deny class certification.

III. The Trial Court Abused Its Discretion In Determining Individual Questions Predominate Where Hospital Policy Failed to Ensure Nurses Were Relieved of Patient Care Responsibilities for Rest Breaks.

The trial court abused its discretion by failing to recognize that common issues predominated where the Petitioners presented these common, overriding questions: 1) whether the Hospital failed to provide work-free rest breaks where it did not ensure nurses were able to transfer patient care for rest periods, 2) whether the Hospital's defense that it allowed nurses to take intermittent rest periods is valid, and 3) whether the Hospital's failure to record and appropriately pay for missed breaks entitles the nurses to back pay for each missed break.

The heart of Petitioners' claims is that the Hospital's policies and practices denied them legally sufficient work-free time to rest and eat during their shifts. They claim that the Hospital failed to schedule 15-minute block rest breaks for nurses in any department and did not relieve them of patient assignment to take rest breaks when the Hospital is busy. CP 53-6. Like many hospital employers attempting to defeat rest and meal break suits, the Hospital defends its actions by claiming that a nurse can legally be "on break" while simultaneously caring for and accepting responsibility for patients as long as he or she is not too busy to do things like engage in brief personal conversation. RP 231-244; CP 68-85.

Similarly, the Hospital defends with the common refrain that nurses enjoy copious "downtime," *Chavez,* 197 Wn. App. 1067, *8, as though hospitals staff to such levels that nurses can leisurely relax and surf the Internet instead of doing the unremitting and life-sustaining work that is required as a nurse. Throughout their shift, nurses must administer multiple rounds of scheduled medications that must be 100 percent accurate 100 percent of the time. Nurses must remain constantly alert and vigilant to alarm bells, patient monitors, patient movement and fall risks, and changes in patient status. There is no room for any margin of error in patient care.

WAC 296-126-092(4) requires scheduled ten-minute uninterrupted rest breaks. However, WAC 296-126-092(5) provides that "[w]here the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each 4 hours worked, scheduled rest periods are not required." DLI Policy ES.C.6 further explains that the nature of the work allows "intermittent breaks" only where employees are allowed to relax and rest or to engage in brief personal inactivity from work or exertion. DLI Policy ES.C.6.[9] In contrast, where employees must continuously perform work without respite, the nature of the work does

[9] Courts give deference to L&I's administrative policies. *See Pellino,* 164 Wn. App. at 688-89.

not allow intermittent breaks and the employer must provide scheduled rest periods of ten consecutive minutes in duration, i.e., "block breaks."

The Court of Appeals has held that where the nature of the work requires continuous work or for workers to remain vigilant, the work does not allow for intermittent breaks. *Pellino,* 164 Wn. App. at 685-86. In *Pellino,* the court observed that because the employer expected the workers to remain "always on duty" or in "active observation and mental exertion at all times," the work did not allow for intermittent breaks. *Id.*

Nurses providing care in a hospital are likewise always in "active observation and mental exertion" because the nature of nursing demands unremitting work. Nurses are legally and ethically obligated to care for their patients. *See* RCW 18.79.260; WAC 246-840-700.[10] WAC 246-840-700 sets the minimum standards for nursing conduct for registered nurses ("RNs"), including such responsibilities as "ongoing client assessment, including assimilation of data gathered from licensed practical nurses and other members of the health care team," "develop[ing] nursing diagnosis and [] identify[ing] client problems in order to deliver effective

[10]"Each individual, upon entering the practice of nursing, assumes a measure of responsibility and public trust and the corresponding obligation to adhere to the professional and ethical standards of nursing practice. The nurse shall be responsible and accountable for the quality of nursing care given to clients." WAC 246-840-700.

nursing care," and "initiating nursing interventions through giving direct care and supervising other members of the care team."

In addition to being responsible for ongoing monitoring, nurses are statutorily prohibited from and may face discipline for "willfully abandoning" patients without transferring care. WAC 246-840-700, WAC 246-840-710(5)(c); RCW 18.79.130. The Department of Health ("DOH") Nursing Care Quality Assurance Commission ("Commission"); establishes, monitors, and enforces standards of practice for RNs licensed in Washington. RCW 18.79.010. The Commission has issued an Interpretive Statement concluding that a nurse commits patient abandonment "when a nurse, who has established a nurse-patient relationship, leaves the patient assignment without transferring or discharging nursing care in a timely manner." Interpretive Statements, Number NCIS 1.0.[11] Transferring patient care, in turn, must include reporting the condition, circumstances, and care needs of all patients under the nurse's care in oral or written form directly to another nurse or appropriate caregiver. *Id*. Examples of patient abandonment include delegating care to an unqualified caregiver and failing to give appropriate information when transferring or discharging care. *Id*.

[11] *Available at* https://www.doh.wa.gov/portals/1/Documents/6000/PatientAbndmt.pdf (last visited November 29, 2017).

Due to their professional and ethical obligation not to abandon patients and to engage in continuous patient monitoring and assessment, nurses may not "rest or relax" or engage in a "brief personal inactivit[y]" while working. L&I Policy ES.C.6. Thus, intermittent rest periods while still responsible for patient assignments are legally insufficient. Petitioners assert here that, like the drivers in *Pellino*, any "mini breaks" the Hospital contends were taken "did not provide a true break from work activity and opportunity for appropriate rest and relaxation and therefore do not qualify as break time under the L&I regulation and interpretive guidance." *Pellino*, 164 Wn. App. at 696.

The trial court abused its discretion in failing to conclude that these common questions of whether the Hospital's policy prevented nurses from the opportunity for a true break from work predominated. Petitioners contend that the Hospital implemented a common policy that denied RNs scheduled, block rest breaks and instead allowed intermittent rest breaks. CP 833-834 (hospital-wide policy providing for "mini rest periods" and instructing employees *not* to record a break as missed if a "mini rest period" occurred). Analysis of whether the Hospital's policy violated nurses' right to rest periods, in light of the nurses' shared ethical and professional obligations and the shared nature of providing nursing care in

a hospital is a common question of fact and law that predominates over the individual issues identified by the trial court.

The trial court found that common class issues did not predominate due to differences regarding "shift, nurse type, nurse roles and job duties, patient assignments and census, managers, and department." *Chavez,* 197 Wn. App. 1067, *12. However, these differences are immaterial to the question of whether the Hospital fulfilled its obligation to provide work-free rest periods. Even assuming nurses in some departments or on some shifts may have had the opportunity to "engage in personal activities," *id.* at *7, common questions still predominate, as the Hospital failed to provide *all* nurses with scheduled "block breaks" and instead relied as a matter of policy on "mini breaks" that did not involve a patient handoff. It is the lawfulness of that policy that a trial will determine, and that question is common to all nurses in the purported class.

Moreover, as noted above, Petitioners need not prove that common issues exist to the *exclusion* of individual ones; it is sufficient that they establish that "an issue shared by the class members is the dominant, central, or overriding issue shared by the class." *Miller,* 115 Wn. App. at 826. *See also Hill,* 198 Wn. App. at 341 (class certification affirmed where "a single issue [shared by the plaintiffs] was 'overriding'") (internal citation omitted). In analyzing this requirement, courts focus "on the

conduct of the defendant, not on the conduct of individual class members." *In re Countrywide Fin. Corp. Customer Data Security Breach Litig.*, 2009 WL 5184352, at *6 (W.D. Ky. 2009); *Smith*, 113 Wn. App. at 674 (predominance requirement was met where the plaintiffs alleged that their harms, although differing, where brought about by *defendant's* "common course of conduct"). Thus, "a claim will meet the predominance requirement where there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position." *In re Cardizem CD Antitrust Litigation*, 200 F.R.D. 297, 307 (E.D. Mich. 2001) (quotations omitted); *see also Hill*, 198 Wn. App. at 339-42 (affirming certification where "overriding" question was sufficiency of rest and meal periods; "while individual branch managers may have treated individual class members differently, the summary judgment motion on liability relied on Garda's state-wide policies [], which applied to all class members"). The Hospital's common policy and practice of failing to provide nurses with scheduled, block breaks similarly applied to all class members here.

Finally, the Hospital may not defeat the common questions that predominate by claiming that in some departments nurses may have had opportunities to take five or ten minutes of break time. To the extent that

the Hospital's provision of "mini breaks" was legally inadequate because the nature of the work does not allow for intermittent breaks, the Hospital is required to pay for each and every rest period that did not conform to WAC 296-126-092 (e.g., a scheduled block break). The question of damages is thus much simpler than the Hospital suggests: where the Hospital's universally-applied policy did not ensure nurses in any department received legally sufficient breaks, it must pay nurses for all of the legally deficient breaks. *See, e.g.*, *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn. 2d 841, 849, 50 P.3d 256 (2002); *Wash. State Nurses Ass'n*, 175 Wn.2d at 831. Calculating damages is then simply a matter of multiplying the number of breaks each nurse was entitled to, based on hours worked, by 10 minutes at the appropriate rate of pay.

IV. The Trial Court Abused Its Discretion in Determining Individual Questions Predominate Where the Hospital Failed to Provide a Second Duty-Free Meal Period As Required By Law.

Common questions predominate with respect to the nurses' meal break claim, specifically: whether the Hospital policy to not provide a second meal break to nurses working 12-hour shifts was unlawful, and whether on-duty, paid meal periods were required because Hospital policy and practice was to interrupt or shorten nurses' meal periods. Petitioners contend there was a hospital-wide custom of providing no relief at all for

the second meal period to nurses scheduled to work 12-hour shifts. *See* CP 346 (Tr. 17:12-14, Clapp, testifying that nurses working a 12-hour shift receive one meal period); CP 1728-1734 at ¶ 12 (Hospital informed nurse working 12-hour shifts that she had a right to only one meal period).

As explained above, this Court could not have been clearer when it held that, "WAC 296-126-092 imposes a mandatory obligation on the employer to provide meal breaks and to ensure those breaks comply with the requirements of WAC 296-126-092." *Brady*, 188 Wn.2d at 584; *Lopez Demetrio*, 183 Wn.2d at 658. An employee asserting a meal break violation under WAC 296-126-092 can meet his or her *prima facie* case by providing evidence that he or she did not receive a meal break that complied with the requirements of the WAC. *Brady*, 188 Wn.2d at 584. The employer may rebut this by showing that no violation occurred or a valid waiver of the right to a meal break exists. *Id*. at 584-85 (adopting the burden-shifting approach from *Anderson*, 328 U.S. at 686-88).

Again, the trial court here focused on differences among shifts and job duties, concluding that differences in "shift, nurse type, nurse roles and job duties, patient assignments and census, managers, and department cause the specifics for each class member to overrun any generalities." *Chavez*, 197 Wn. App. 1067, *12. But such differences do not detract from the common questions on the Petitioners' meal break claim, which

involves allegations that second meal periods were routinely not provided hospital-wide. It was an abuse of the trial court's discretion to deny class certification on the second meal period claim because the existence of some variability does not defeat the common questions that predominate; it is sufficient to establish that meal periods were routinely not provided. *See Alberts v. Aurora Behavioral Health Care*, 241 Cal. App. 4th 388, 193 Cal.Rptr. 3d 783, 797 (Cal. Ct. App. 2015) (holding it was an abuse of discretion to deny certification of a class of hospital nurses who were routinely denied statutorily-guaranteed meal breaks even though the employer's meal break policy was facially valid, and the nurses were unable to prove a "universal practice" of denying breaks); *Faulkinbury v. Boyd & Associates*, 216 Cal. App. 4th 220, 156 Cal. Rptr.3d 632, 641 (Cal. Ct. App. 2013) (lawfulness of employer's policy requiring all security guards to take an on-duty meal period was predominant question in lawsuit).

Moreover, the damages owed to class members for legally deficient second meal periods would be readily and formulaically calculable from the Hospital's own time records. Failure to provide a lawful meal period to class members requires the Hospital to pay an extra 30 minutes for each five continuous hours worked. *See IBP v. Alvarez*, 339 F.3d 894, 914 (9th Cir. 2003) ("[u]nder Wash. Admin. Code § 296–

126–092, plaintiffs are owed compensation for the full thirty-minute period where IBP has intruded upon or infringed the mandatory thirty-minute term to any extent."), *aff'd*, 546 U.S. 21 (2005); *Pellino*, 164 Wn. App. at 690; L&I Admin. Policy ES.C.6, § 7, at 4 ("[a]s long as the employer pays the employees during a meal period in this circumstance and otherwise complies with the provisions of WAC 296–126–092, there is no violation of this law, and payment of an extra 30–minute meal break is not required") (*quoted* in *Pellino*, 164 Wn. App. at 689). Thus, no individualized questions of damages arise with this claim, where Hospital policy required nurses to remain "on duty" for the second meal period without work-free time or provided no meal period at all.

To the extent that the Hospital argued that *some* nurses may have in *some* instances received legally sufficient meal periods (e.g., 30 minutes of work-free time to eat), if Petitioners can prove that the Hospital otherwise denied nurses legally sufficient meal periods, than such exceptions simply go to the measure of damages, which cannot defeat class certification.

CONCLUSION

For all the above-stated reasons, *amici curiae* respectfully request that this Court reverse the Court of Appeals' decision and hold that the trial court erred by denying class certification to the nurses.

RESPECTFULLY SUBMITTED this 1st day of December, 2017.

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